INFORMAL EPA ACTION UNDER CERCLA: PROBLEMS OF JUDICIAL REVIEW

I. INTRODUCTION

Courts have played an important role[1] in shaping the parameters of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[2] Despite the judiciary's significant role,[3] the first meaningful review of informal Environmental Protection Agency (EPA) decisionmaking concerning hazardous substance[4] cleanup activity may occur only when the EPA brings suit against a potentially responsible party.[5] Whether the suit is to enjoin the party

1. *See generally* Frank & Atkeson, *Superfund: Litigation and Cleanup*, 16 Env't. Rep. 1 (BNA) (1985).

2. 42 U.S.C. § 9601-9657 (1982 & Supp. III 1985). The Act is commonly referred to as "Superfund."

3. Congress passed CERCLA with very little debate during the closing days of a lame duck session. The legislative history demonstrates that the final statute was a compromise of three different Superfund bills. Consequently, the courts were left to answer many questions. *See* Frank & Atkeson, *supra* note 1, at 7; Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1-2 (1982); Note, *The Role of Injunctive Relief and Settlements in Superfund Enforcement*, 68 CORNELL L. REV. 706, 710 (1983).

4. "Hazardous substance" is defined in § 101(14) of CERCLA, 42 U.S.C. § 9601(14) (1982), as any substance, waste, or pollutant designated pursuant to §§ 307(a) and 311(b)(2)(A) of the Clean Water Act, § 3001 of the Resource Conservation and Recovery Act, § 112 of the Clean Air Act, or § 102 of CERCLA. Crude oil and fractions thereof, natural gas, and liquefied natural gas are exempted from statutory coverage. For the purposes of this article, the terms "hazardous substance" and "hazardous waste" are synonymous.

5. *See* Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 314-19. Anderson states:

> CERCLA's history in the courts presents a paradox. On the one hand, most of the decisions that the EPA makes prior to suing for direct cleanup or reimbursement involve various species of ill-defined informal agency action. Judicial review of these actions will probably develop hesitantly and with less clarity and will probably be more restricted than review under typical welfare statutes. On the other hand, the large number of pending enforcement and reimbursement actions suggests that CERCLA is a thoroughly "judicialized" statute.

Id. at 314-15.

to clean up a release[6] or to seek reimbursement for government cleanup costs,[7] the EPA will have already made a series of informal decisions that in many instances are both important and irreversible. This Recent Development addresses the issues involved with judicial review of informal EPA cleanup actions under CERCLA. Specifically, the article addresses who can challenge EPA action or inaction, when a challenger is permitted to seek judicial review, and what type of relief is available. Though the courts have generally provided consistent answers to these questions, controversy exists over CERCLA's ability to withstand constitutional due process challenges.

Before any cleanup activities occur the EPA must identify potentially hazardous waste sites. As required by section 105 of CERCLA,[8] the agency identifies and investigates potential sites in accordance with the National Contingency Plan (NCP).[9] Section 105(8) also charges the EPA with establishing criteria for determining cleanup priorities among hazardous waste release sites and formulating a National Priorities List.[10] In coordination with other federal agencies, state and local governments, and private entities, the EPA may conduct preliminary assessments of the site, ask other parties to begin investigations, and send out "notice" letters[11] to potentially responsible parties.[12] A potentially responsible party is anyone who may be liable in a cost recovery action under section 107(a).[13]

In order to fully comprehend the scope of judicial review problems under CERCLA, one must consider the EPA's alternative cleanup actions under CERCLA. When the EPA decides that cleanup action is

6. *See infra* notes 30-71 and accompanying text.

7. *See infra* notes 72-87 and accompanying text.

8. 42 U.S.C. § 9605 (1982).

9. 40 C.F.R. § 300.1-.86 (1986).

10. 42 U.S.C. § 9605(8) (1982); 40 C.F.R. § 300.66(e) (1986). *See* Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 922 (D.C. Cir. 1985) (court upheld EPA inclusion of certain mining and electric utility facilities on the National Priorities List).

11. Initially a notice letter was quite brief, specifying a party's suspected involvement and providing an opportunity to voluntarily clean up the site. In 1983 the EPA issued guidelines that suggested the notice letter contain more extensive information about the EPA's evaluation of the site. *See* Anderson, *supra* note 5, at 289-90; Thomas & Price, *EPA Memorandum on Use and Issuance of Administrative Orders Under Section 106(a) of CERCLA, reprinted in* [Federal Laws] Env't Rep. (BNA) 41:2931 (1983).

12. *See* 42 U.S.C. § 9604 (1982); 40 C.F.R. § 300.61-.71 (1986); Frank & Atkeson, *supra* note 1, at 6-16.

13. For the list of those who may be found liable in a § 107(a) cost recovery action, see *infra* note 73.

needed, three basic options are available.[14] First, the EPA can file suit to obtain a court order forcing a responsible party to take necessary action.[15] Second, the EPA can issue an administrative order requiring responsible parties to take appropriate action.[16] Finally, the EPA can expend money from the Hazardous Substance Response Fund (Superfund)[17] to clean up the site.[18] Following any cleanup action by the EPA, any responsible party may be liable for the cleanup costs under section 107.[19]

II. PRELIMINARY INVESTIGATION AND JUDICIAL REVIEW

Some potentially responsible parties have sought judicial review of informal EPA decisions made during the preliminary investigation of a potentially hazardous waste site. In *D'Imperio v. United States*[20] plaintiffs sought a declaratory judgment that they were not liable for cleanup costs under CERCLA.[21] The EPA had released 250,000 dollars from Superfund for the purpose of studying a dumpsite owned by

14. The EPA's fourth option is a private settlement with a party that agrees to clean up the site. This option is beyond the scope of this article. *See* Anderson, *supra* note 5; Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1, 35-38 (1972); Note, *supra* note 3.

15. 42 U.S.C. § 9606(a) (1982). CERCLA § 104(a) refers to the "owner or operator" or "other responsible party" as the person to whom the EPA can look to determine whether cleanup of a site will be done properly before expending CERCLA funds. Thus, those same persons could be recipients of an order issued under § 106(a). *See* United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 839 (W.D. Mo. 1984); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1113 (D. Minn. 1982); United States v. Outboard Marine Corp., 556 F. Supp. 54, 57 (N.D. Ill. 1982). *Contra* United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982) (court refused to find that § 106 applied to nonnegligent parties that had been offsite generators but were no longer generating hazardous wastes), *appeal dismissed*, 713 F.2d 49 (3d Cir. 1983).

The EPA, however, takes the position that it is possible to issue orders to parties other than those listed in § 107(a) if such action is necessary to protect the public or the environment. *See* United States v. Outboard Marine Corp., 556 F. Supp. 54, 56 (N.D. Ill. 1982); Thomas & Price, *supra* note 11, at 5.

16. 42 U.S.C. § 9606(a) (1982).

17. *Id.* § 9631. This $1.6 billion fund is derived from taxes on crude oil and chemical feedstock and from general revenues.

18. *Id.* § 9604(a)(1).

19. 42 U.S.C. § 9607 (1982 & Supp. III 1985).

20. 575 F. Supp. 248 (D.N.J. 1983).

21. *Id.* at 250. In addition, plaintiffs sought a declaration that if they contributed to the cost of the cleanup, they would be compensated under § 107(a)(4)(B). *Id. See infra* note 73.

the plaintiffs. The EPA advised the plaintiffs, in a notice letter, that they might be a responsible party with respect to the site. In addition, the EPA informed the plaintiffs that they could be liable under section 107 of CERCLA for all costs incurred by the government in connnection with the site.[22] The district court dismissed the action, finding that the notice letter was not a definitive statement of position and therefore not "final" agency action.[23] Consequently, plaintiffs could not challenge cleanup cost liability because liability had not yet been imposed.[24]

In *Cotter v. EPA*[25] the plaintiff objected to the EPA's informal decision to include a particular site on the National Priorities List because the EPA failed to consult with the State of Colorado. The court, however, summarily held that the agency action was not ripe for review.[26] In another controversy, *Wickland Oil Terminals v. ASARCO, Inc.*,[27] plaintiff landowner did not challenge an informal decision made by the EPA. Rather, plaintiff, the owner of a newly discovered hazardous waste site, sought relief from the former owner after the EPA placed the site on the California Department of Health Services (DOHS) haz-

22. 575 F. Supp. at 250.

23. *Id.* at 252. The Administrative Procedure Act (APA) provides in pertinent part: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704 (1982).

Because CERCLA does not expressly provide that notice letters are reviewable, it is important under the APA to determine whether EPA action is "final" or "preliminary." The court found that a notice letter represented only a threshold determination. Thus, further inquiry into the liability of each party was warranted. The court found this situation analogous to Federal Trade Comm'n v. Standard Oil Co., 449 U.S. 232, 239-42 (1980) (FTC complaint stating that the agency had "reason to believe" the named parties had violated the Federal Trade Commission Act did not constitute "final agency action").

Other justifications for granting judicial review only after "final agency action" include allowing the EPA the opportunity to correct its mistakes, *Standard Oil,* 449 U.S. at 242, and preserving scarce investigative and prosecutorial resources, Dresser Indus., Inc. v. United States, 596 F.2d 1231, 1236 (5th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980). For a more detailed discussion of "final agency action," see *infra* note 34.

24. *D'Imperio*, 575 F. Supp. at 153.

25. Cotter v. EPA, 21 Env't Rep. Cas. (BNA) 2231, 2232 (D. Colo. 1984).

26. *Id.* In a separate claim plaintiffs charged that the EPA unlawfully expended Superfund money for investigation. The court held that even though there may ultimately be a cost recovery action, plaintiff did not have any special interest in challenging expenditures. *Id.*

27. 590 F. Supp. 72 (N.D. Cal. 1984).

ardous waste site list. The court held that the mere placement of the site on the DOHS hazardous waste site list was insufficient to create a live controversy.[28] The placement, the court noted, did not assure that the DOHS would seek enforcement.[29]

III. COURT INJUNCTION

When the EPA files suit to require a third party to take appropriate cleanup action under section 106(a), judicial review is not an issue because the EPA brings the controversy to the court system. This method, however, is very time consuming.[30] The discovery process alone can be very complex and take years to complete. After years of delay in several cases, the EPA has abandoned this method in favor of one of the other statutory alternatives discussed below.[31]

IV. EPA ADMINISTRATIVE ORDER AND PRE-ENFORCEMENT REVIEW

The EPA can use a second option under section 106(a) of CERCLA and issue an administrative order directing a responsible party to take necessary cleanup action.[32] Before issuing an administrative order, however, the EPA must determine that "an imminent and substantial

28. *Id.* at 76.

29. *Id. See also* S. REP. No. 848, 96th Cong., 2d Sess. 60 (1980) ("The priority lists serve primarily informational purposes. . . . Inclusion of a facility or site on the list does not in itself reflect a judgment of the activities of its owner or operator . . . nor does it assign liability to any person.").

Plaintiffs also sought reimbursement for costs in testing the site. The court found that an authorized governmental cleanup initiated by the EPA or by state authorities pursuant to a cooperative agreement must be commenced before a private party can state a damages claim under CERCLA. 590 F. Supp. at 77.

30. For a more complete discussion of the advantages and disadvantages of judicially ordered cleanup, see Anderson, *supra* note 5, at 304-06 (lawsuits provide the government with "strong precedents for use in future mandatory cleanup and cost recoupment actions").

31. *See* United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412 (D. Minn. 1985) (EPA dropped suit and issued administrative cleanup order); United States v. Outboard Marine Corp., 104 F.R.D. 405, 22 Env't Rep. Cas. (BNA) 1124 (N.D. Ill. 1984) ("[a]fter several years of litigation, however, the United States has decided to clean the Harbor up by itself").

32. 42 U.S.C. § 9606(a) (1982). The EPA calls this "one of the most potent administrative remedies available to the Agency under any existing environmental statute." Thomas & Price, *supra* note 11, at 3. Attorneys who represent companies subject to these orders have expressed concern about the nature of this power. *See* Light, *A Defense Counsel's Perspective on Superfund*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 10,203

endangerment may exist."[33] After reviewing the administrative order procedure, courts have universally found that Congress did not intend the EPA determination to be subject to immediate judicial review.[34]

(1985); Rogers, *Companies Fear Sweeping Superfund Cleanup Order*, Legal Times, June 18, 1984, at 11, col. 1.

33. 42 U.S.C. § 9606(a) (1982). This section provides in part:

> In addition to any other action taken by a State or local government, when the President determines that there may be *an imminent and substantial endangerment* to the public health or welfare or the environment because of an actual or threatened release of hazardous substance from a facility, ... The President may . . . take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

Id. (emphasis added).

For a definition of "imminent and substantial endangerment," see United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 846 (W.D. Mo. 1984); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1109-10 (D. Minn. 1982). Because neither CERCLA nor its legislative history specifically define this phrase, both of these cases cited the House Committee Report accompanying § 1431 of the Safe Water Drinking Act. The Report states in part:

> In using the words "imminent and substantial endangerment to the health of persons," the Committee intends that this broad administrative authority not be used when the system of regulatory authorities provided elsewhere in the bill could be used adequately to protect the public health. Nor is the emergency authority to be used in cases where the risk of harm is remote in time, completely speculative in nature, or *de minimis* in degree. However, as in the case of U.S. v. United States Steel, Civ. Act No. 71-1041 (N.D. Ala. 1971), under the Clean Air Act, the Committee intends that this language be construed by the courts and the Administrator so as to give paramount importance to the objective of protection of the public health. . . .
>
> Furthermore, while the risk of harm must be "imminent" for the Administrator to act, the harm itself need not be. Thus, for example, the Administrator may invoke this section when there is an imminent likelihood of the introduction into drinking water of contaminants that may cause health damage after a period of latency.

H.R. REP. NO. 1185, 93rd Cong., 2d Sess. 35-36, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6454, 6487-88. *See also* Ethyl Corp. v. EPA, 451 F.2d 1, 13 (D.C. Cir.) (endangerment amounts to less than actual harm) *cert. denied*, 426 U.S. 941 (1976); Reserve Mining Co. v. EPA, 514 F.2d 492, 529 (8th Cir. 1975), *modified*, 529 F.2d 181 (8th Cir. 1976); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971) ("a hazard may be 'imminent' even if its impact will not be apparent for many years").

Section 106(a) is one of several imminent hazard provisions that Congress has included in environmental statutes. *See* § 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 (1982); § 1431 of the Safe Drinking Water Act, 42 U.S.C. § 3001(a) (1982); § 504(a) of the Clean Water Act, 33 U.S.C. § 1364(a) (1982); § 303 of the Clean Air Act, 42 U.S.C. § 7603 (1982).

34. *See* Wagner Elec. Corp. v. Thomas, 612 F. Supp. 736, 738 (D. Kan. 1985); United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 418 n.2 (D. Minn. 1985);

Judicial review is not available even when responsible parties fail to challenge the EPA directly.[35] For example, in *Earthline Co. v. Kin-*

Aminoil, Inc. v. EPA, 599 F. Supp. 69, 71 (C.D. Cal. 1984). Courts have found legislative intent in CERCLA's legislative history to preclude judicial review. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). Courts cite the following House Report passage with regularity: "The Committee recognizes that emergency action will often be required prior to the receipt of evidence which conclusively establishes an emergency. Because delay will often exacerbate an already serious situation, the bill authorizes the Administrator to take action when an imminent and substantial endangerment may exist." H.R. REP. NO. 1016, 96th Cong., 2nd Sess. 28, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6131. The general guidelines for issuance of EPA orders is as follows:

> [T]he Administrator may by order require a responsible party to take such remedial action. Prior to issuing an order, however, the Administrator must confer with the responsible party as to the reasonableness of the order, *which should clearly set forth reviewable standards governing its issuance. Judicial review of such an order would not preclude the Administrator from taking appropriate action.*

Id. (emphasis added).

In addition to court decisions, proposed legislation rejects judicial review of § 106(a) orders. *See* S. REP. NO. 11, 99th Cong., 1st Sess. 58, 115 (1985). The proposal provides:

> No court shall have jurisdiction to review any challenges to response action selected under section 104 or any order issued under section 104, or to review any order issued under section 106(a), in any action other than (1) an action under section 107 to recover response costs or damages or for contribution or indemnification; (2) an action to enforce an order issued under sections 104 or 106(a) or to recover a penalty for violation of such order; or (3) an action for reimbursement under section 106(b)(2).

Id. at 115.

For arguments advocating judicial review, *see* Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 263, 305-09 (1984); Note, *supra* note 3, at 712 n.40.

Despite virtually unanimous court decisions and the potential amendments, the ability to attack the constitutionality of CERCLA penalties for non-compliance with administrative orders does provide some pre-enforcement judicial review. *See infra* notes 43-71 and accompanying text. The result can cause litigation delays and can force the EPA to expend Superfund money to clean up the site itself. *See* Solid State Circuits Inc. v. EPA, 23 Env't Rep. Cas. (BNA) 1758 (W.D. Mo. 1985).

35. A comparison of § 106(a) with the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1982 & Supp. III 1985), provides helpful insight. Under RCRA the EPA may issue an administrative order under both § 3013, 42 U.S.C. § 6934 (1982), and § 7003, 42 U.S.C. § 6973 (1982). Section 3013 provides that the EPA may order the owner or operator of a facility to conduct monitoring, analysis, and testing to ascertain the nature and extent of a hazard. Section 7003 is an all-purpose provision similar to § 106(a) of CERCLA.

One court indicated that there may be judicial review of an RCRA administrative order issued under § 3013. *See* E.I. DuPont de Nemours & Co. v. Daggett, 610 F. Supp. 260 (W.D.N.Y. 1985). Under the authority of § 3013 the EPA directed the plaintiff in *Daggett* to develop and submit to the EPA an evaluation plan with respect to

Buc Inc.,[36] the EPA issued an order that was binding on eleven persons named jointly and severally as respondents. The order did not specifically assign certain tasks to each respondent. Instead, the order simply made each respondent responsible for performing every task.[37] Unable to agree on a coordinated plan for cleanup, the parties sought a clarification of their rights and obligations. The court held that issuance of the order alone did not constitute final agency action under section 704 of the Administrative Procedure Act.[38] Thus, the *Earthline* court established the rights and liabilities of parties under the EPA order only after initiation of an EPA enforcement proceeding.[39]

The combination of CERCLA's joint and several liability and the EPA's unwillingness to assign specific cleanup tasks creates a major dilemma for multiple respondents with respect to administrative orders.[40] Each respondent must consider a number of factors, including

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groundwater monitoring wells at a landfill site. *Id.* Both the EPA and plaintiff construed § 3013 to preclude judicial review because they interpreted it as analogous to § 106(a) of CERCLA. *Id.* at 2078. Consequently, plaintiff argued that RCRA was unconstitutional because of the lack of judicial review and sought a preliminary injunction. *Id.* at 2076. The court held that the emergency rationale for precluding review under § 106 of CERCLA was absent with respect to § 3013 of RCRA. *Id.* at 2078. The court noted that the EPA can issue an administrative order under § 3013 as a preventative tool unrelated to an imminent and substantial endangerment. The court, therefore, found it unlikely that Congress intended to foreclose pre-enforcement review of EPA orders under § 3013. *Id.*

This finding suggests that judicial review should depend on the nature of the CERCLA administrative order. For example, if the order is analogous to a § 3013 order under RCRA, judicial review could be justified. Even though the situation might technically meet the liberal "imminent and substantial endangerment" test, the emergency justification would be weaker. Thus, the due process interests of the respondent might outweigh the EPA's interests in testing the site.

Judicial review is also available under the Clean Air Act, 42 U.S.C. § 7420(b)(4)(B), and the Surface Mining Control & Reclamation Act of 1978, 30 U.S.C. § 1268(b). *See, e.g.*, B & M Coal v. Office of Surface Mining Reclamation, 531 F. Supp. 677 (S.D. Ind. 1982), *aff'd*, 699 F.2d 381 (7th Cir. 1983).

36. 21 Env't Rep. Cas. (BNA) 2157 & 2161 (D.N.J. 1984).

37. *Id.* at 2158.

38. *Id.* at 2161.

39. *Id.* at 2162. *See supra* note 22 for text and discussion of the pertinent APA section.

40. *See* Light, *supra* note 32, at 10,207. Light states:

> [T]he government wants to have the widest array of potential defendants, each liable for all cleanup costs, ensuring that parties can be tapped to pay for the entire cleanup whenever the government decides—on whatever basis it decides—to pick them. In essence, this amounts to a headlong rush after the deep pocket, without

the financial condition of the other respondents[41] and the ability of the group to agree on the distribution of cleanup responsibilities. Without judicial or administrative review of the EPA's cleanup order,[42] these factors create a great deal of uncertainty and make informed business decisions difficult.

Even without multiple party complications, a potentially responsible party that receives an EPA order to initiate cleanup activity at a hazardous waste site can find itself in a very difficult position. Refusal to comply with the administrative order may subject the party to the penalties contained in CERCLA.[43] The penalties for non-compliance range up to 5,000 dollars per day with punitive damages up to three times the amount of cleanup costs.[44]

Yet, consider the alternative. A party complying with an order is not entitled to seek reimbursement from the federal government even if the complying party subsequently establishes its lack of responsibility in court. The party's sole remedy is to identify the responsible party and seek reimbursement from that party.[45] Proposed legislation, if en-

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particular regard for degree of involvement or for any earlier payment of CERCLA taxes.

Id. Even the EPA acknowledges the problem. *See* Thomas & Price, *supra* note 11, at 6 ("In a large group of responsible parties, it may be difficult for the group to develop a consensus on individual liability and perform response activities as quickly as necessary to abate imminent hazard conditions at the site.").

41. *See infra* notes 45-46 and accompanying text.

42. In an attempt to save the parties from themselves, the *Earthline* court exercised its equitable powers and equally divided the costs of cleanup, until it could make the proper factual findings at an evidentiary hearing after cleanup. 21 Env't Rep. Cas. (BNA) at 2161.

43. *See, e.g.*, Aminoil, Inc. v. EPA, 599 F. Supp. 69, 73 (C.D. Cal. 1984). The *Aminoil* court stated that

> [n]othing in the statute precludes EPA from waiting an extended period of time before bringing an enforcement action. If the alleged responsible parties unsuccessfully challenge the administrative order in the enforcement action, the daily penalties will have accrued between the time of the responsible parties' noncompliance with the order and the actual enforcement proceeding.

Id. See also Wagner Elec. Corp. v. Thomas, 612 F. Supp. 736, 739 (D. Kan. 1985) (because CERCLA requires no administrative hearing before the EPA issues a cleanup order, a responsible party's liability for daily penalties and punitive damages may accrue prior to any administrative or judicial hearing).

44. 42 U.S.C. §§ 9606(b), 9607(c)(3).

45. *See Aminoil*, 599 F. Supp. at 73-74; *Wagner Elec.*, 612 F. Supp. at 742. The *Wagner Electric* court noted that potentially responsible plaintiffs often face the choice of either failing to comply and facing massive liability, or complying and virtually abandoning any hope of recovering funds spent on cleanup activities for which they were not

acted, would rectify this problem.[46]

Confronted with this awkward choice, respondents to an administrative order must allege that the statutory structure obstructs the right to judicial review by allowing civil penalties to accrue before any opportunity for a hearing.[47] Parties have argued that when the EPA seeks judicial enforcement of an administrative cleanup order, the high penalties resulting from a losing court battle encourage a potentially responsible party to comply with the order. Therefore the statutory penalties eliminate the opportunity for judicial review at any stage.[48]

In *Aminoil, Inc. v. EPA*[49] the court found that the statutory structure obstructed the availability of judicial review. The district court

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responsible. *Id. See also* United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 416 (D. Minn. 1985) (stating that a party who complies with an EPA order has no meaningful opportunity to test the order's merits).

46. *See* proposed amendment to § 106(b)(2), S. REP. No. 11, 99th Cong., 1st Sess. 100 (1985):

> (A)Any person who receives and complies with the terms of any order issued under subsection (a) may, within sixty days of completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. . . . (C) To obtain reimbursement, the petitioner must establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order. . . .

47. *See Wagner Elec.*, 612 F. Supp. at 742-43; *Reilly Tar,* 606 F. Supp. at 417; *Aminoil,* 599 F. Supp. at 75.

48. Two Supreme Court decisions recognized and set forth the due process concerns surrounding the lack of any real judicial review opportunity. *See Ex parte* Young, 209 U.S. 123 (1908) (Court held state statutes establishing maximum rail rates and providing large penalties, including imprisonment, for violation constitutionally invalid because responsible parties had been given no viable opportunity to contest validity of the rates); Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920) (Court found no opportunity for judicial review of a state agency order because judicial review burdened with the possibility of high fines and imprisonment does not satisfy constitutional requirements).

Subsequent decisions acknowledged that the opportunity for judicial review is a due process right, but held that the companies had not availed themselves of an opportunity to challenge the government agency. *See, e.g.,* St. Regis Paper Co. v. United States, 368 U.S. 208 (1961) (fixed statutory forfeitures of $100 per day for failure to file special reports in compliance with FTC orders not invalid when petitioner did not try to obtain judicial review prior to commencement of the Government's penalty action, and petitioner did not seek a stay once litigation had begun); St. Louis, Iron Mountain & Southern Ry. v. Williams, 251 U.S. 63 (1919) (railroad company did not take advantage of its opportunity to challenge the validity of new rates); Wadley Southern Ry. v. Georgia, 235 U.S. 651 (1915) (when state railroad commission joint rate order was made after hearing and carrier did not avail itself of a safe, adequate, and available statutory judicial review, statute authorizing a $5,000 per day penalty for violation was not invalid).

49. 599 F. Supp. 69 (C.D. Cal. 1984).

noted that the penalty provisions of sections 106(b) and 107(c)(3) do not apply to a party demonstrating sufficient cause for non-compliance with an administrative order.[50] After examining the legislative history,[51] however, the court narrowly construed "sufficient cause." The court found that "sufficient cause" does not apply to situations in which an alleged responsible party asserts a reasonable and good faith defense that the court ultimately rejects.[52] Thus, the court held that the statutory structure coerced plaintiffs into foregoing their legal challenge to the administrative order. The court then enjoined the accrual of the CERCLA penalties.[53]

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50. *Id.* at 73. 42 U.S.C. § 9607(c)(3) (1982) provides in part:

> If any person who is liable for a release or threat of release of a hazardous substance fails *without sufficient cause* to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person *may* be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs. . . .

Id. (emphasis added).

51. SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENT RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980, Part 1, at 770-71 (1983) [hereinafter LEGISLATIVE HISTORY]. Senator Stafford, commenting on the sufficient cause requirement, stated:

> We intend that the phrase "sufficient cause" would encompass defenses such as the defense that the person who was the subject of the President's order was not the party responsible under the act for the release of the hazardous substance. It would certainly be unfair to assess punitive damages against a party who for good reason believed himself not to be the responsible party. For example, if there were, at the time of the order, substantial facts in question, or if the party subject to the order was not a substantial contributor to the release or threatened release, punitive damages should either not be assessed or should be reduced in the interest of equity. There could also be "sufficient cause" for not complying with an order if the party subject to the order did not at the time have the financial or technical resources to comply or if no technological means for complying was available.
>
> We also intend that the President's orders, and the expenditures for which a person might be liable for punitive damages, must have been valid. In particular, they must not be inconsistent with the national contingency plan and must in the President's belief, have been required in order to protect the public health or welfare or the environment. Thus, in deciding whether a person should be liable for punitive damages, we would expect the courts to examine the particular orders or expenditures from the fund to determine whether they were proper, given the standards of the act and of the national contingency plan, taking into account the fact that a threat to the public was posed by the situation sought to be corrected. If the orders or expenditures were not proper, then certainly no punitive damages should be assessed or they should be proportionate to the demands of equity.

Id. at 770-71.

52. 599 F. Supp. at 73.

53. *Id.* at 72-75.

Two other courts, however, reached the opposite result and refused to enjoin CERCLA penalties. These courts relied on the existence of a "good faith" defense[54] to an administrative order and the discretionary character of the civil penalties.[55] In *United States v. Reilly Tar & Chemical Corp.*[56] the court disagreed with the *Aminoil* decision and held that the "sufficient cause" defense should be interpreted liberally. After reexamining the legislative history, the court interpreted the "sufficient cause" defense to include a good faith challenge to the cost effectiveness of an EPA order.[57] Another district court decision, *Wagner Electric Corp. v. Thomas*,[58] found that courts should liberally interpret "sufficient cause" to refuse compliance with an administrative order.[59] The court agreed not to penalize a party that could show any "good faith" defense.[60]

Wagner Electric is significant because the district court addressed particular public policy considerations.[61] In the opinion's "caveat" section, the court speculated that respondents to EPA cleanup orders have some basis for a good faith defense. Courts, therefore, rarely assess the treble damages penalty under section 107.[62] Because this pen-

54. In Reisman v. Caplin, 375 U.S. 440 (1964), taxpayers' attorneys sought declaratory and injunctive relief on the invalidity of internal revenue commissioner's summons. The court stated that "[i]t is true that any person summoned who 'neglects to appear or to produce' may be prosecuted under § 7210 [of the Internal Revenue Code] and is subject to a fine.... However, this statute on its face does not apply where the witness appears and interposes good faith challenges to the summons." *Id.* at 446-47.

55. *See supra* note 50 and accompanying text.

56. 606 F. Supp. 412 (D. Minn. 1985).

57. *Id.* at 420. Senator Stafford stated that a respondent may allege that the administrative order is "inconsistent with the national contingency plan." LEGISLATIVE HISTORY, *supra* note 51, at 771. The *Reilly Tar* court noted that cost effectiveness is an integral part of the national contingency plan. 606 F. Supp. at 420. *See* 42 U.S.C. § 9605(2), (7) (1982) and 40 C.F.R. § 300.68(j) (1986).

58. 612 F. Supp. 736 (D. Kan. 1985).

59. The court defined "good faith" or "sufficient cause" as any "reasonable ground to contest." *Id.* at 743-45.

60. *Id.* at 745. Without this interpretation, the court noted that the burden on plaintiff's access to due process might be constitutionally invalid. In response, the court invoked a Supreme Court admonition: "If a [particular] construction of the statute is fairly possible by which a serious doubt of constitutionality may be avoided, a court should adopt that construction. In particular, this Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary." *Id.* (quoting Califano v. Yamasaki, 442 U.S. 682, 693 (1979)); *see also Reilly Tar*, 606 F. Supp. at 419 n.3.

61. 612 F. Supp. at 749.

62. *Id.*

alty is not a significant threat to noncompliance, a party has much less incentive to comply with the cleanup order and may wait for judicial enforcement. Consequently, the administrative order loses its effectiveness as a means of ensuring prompt hazardous waste cleanup.[63] The *Wagner Electric* court noted that advocating a good faith standard might act to undermine Congress' intent in enacting CERCLA.[64] In summary, the *Wagner Electric* court found CERCLA constitutionally valid by upholding an individual's due process right to a good faith defense for noncompliance with an EPA administrative order. The court recognized, however, that acknowledging the good faith defense creates an obstacle to prompt cleanup of hazardous waste.

In a proposed remedy to this dilemma, the *Wagner Electric* court advised the EPA to grant an administrative hearing to respondent.[65] The court suggested that if the EPA presented persuasive evidence of that party's "responsibility" at the hearing, the "reviewing court would be far less likely to accept a party's contention that its challenge to an EPA order was asserted in objective good faith."[66]

The *Wagner Electric* court attempted to create a compromise in the due process dilemma surrounding judicial review of EPA cleanup standards under CERCLA. This compromise is effective when respondent's "good faith" contention challenges its status as a responsible party under CERCLA. As the court recognized, CERCLA clearly establishes which parties are responsible for hazardous waste releases.[67] The EPA, therefore, has the opportunity to present clear and persuasive evidence concerning the parties' status as a responsible party at the administrative hearing.

In contrast, if a respondent challenges the cost effectiveness of an EPA cleanup order,[68] the issue at the administrative hearing would not be so clear. Any challenge to an order's cost effectiveness involves a detailed technical analysis of the EPA investigation and a feasibility study of the hazardous waste site. During this process, the EPA must produce and defend studies demonstrating the technical feasibility and probable cost of alternative remedial actions. The agency must also

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* Section 107 is a very broad section. *See infra* note 73 for pertinent text of this section.

68. *See Reilly Tar*, 606 F. Supp. at 420-21.

introduce information showing the degree of risk to public health and welfare and the environment presented by the particular site. Although the EPA will have previously compiled this evidence,[69] the mere existence of complex evidentiary issues at an administrative hearing creates at least two significant problems. First, an administrative hearing is time consuming. Second, if the issues are complex the EPA will have more difficulty presenting the "persuasive" evidence *Wagner Electric* requires to eliminate the respondent's good faith defense.

Despite these problems, the EPA should grant an administrative hearing to respondents who challenge a cleanup order.[70] If the issues are complex the administrative hearing provides a practical and efficient setting for their resolution. Administrative law judges have better expertise and understanding of the issues.[71] Thus, the administrative procedure takes less time than a federal court challenge and helps to narrow the issues confronting administrative judges. Finally, EPA cleanup orders will lose their effectiveness if courts become reluctant to impose CERCLA penalties. The administrative hearing will protect against this result.

V. EPA CLEANUP AND PRE-EXPENDITURE REVIEW

After determining that a party will not comply with a judicial or administrative order, the EPA can expend Superfund money to remedy the situation.[72] After the EPA completes the cleanup activity, it can seek reimbursement from a responsible party under section 107.[73]

In situations similar to the EPA's issuance of an administrative order, the courts hold that Congress did not intend to permit judicial review until completion of the cleanup. Judicial review is available

69. *See* Price & Thomas, *EPA Memorandum on Cost Recovery Actions Under CERCLA, reprinted in* [Federal Laws] Env't Rep. (BNA) 41:2861 (1983).

70. Some commentators highlight the benefits of an administrative hearing. *See* Anderson, *supra* note 5, at 306; Note, *supra* note 3, at 712 n.40.

71. *See generally* Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363 (1976).

72. 42 U.S.C. § 9604(a) (1982). Congress may have intended that EPA Superfund cleanup would be the heart of CERCLA. Throughout its life, however, Superfund has never been sufficient to effectively finance a significant percentage of potentially hazardous waste sites in the United States. *See* United States v. Wade, 546 F. Supp. 785, 793 n.22 (E.D. Pa. 1982); Anderson, *supra* note 5, at 301-04 (there are other problems with cleanup by Superfund, including coordinating actions with state agencies and controlling "government" costs).

73. 42 U.S.C. § 9607(a) (1982). Section 107(a) provides in part:

only when the government seeks reimbursement for cleanup expenses from responsible parties.[74] The courts consistently hold that plaintiffs' ability to raise all objections to an EPA action in a subsequent cost recovery suit limits due process concerns.[75]

In *J.V. Peters & Co. v. Ruckelshaus*[76] the district court found a limited right to judicial review when the EPA's actions are arbitrary and capricious.[77] Rejecting the district court's reasoning, the court of appeals relied heavily on a 1985 Senate Report and a proposed CERCLA

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel . . . or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . .

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan . . . (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

Id. *See* Price & Thomas, *supra* note 69, at 41:2861. Courts have found that § 107 imposes strict liability on responsible parties. *See* U.S. v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844 (W.D. Mo. 1984); Bulk Distrib. Centers Inc. v. Monsanto Co., 589 F. Supp. 1437, 1443 n.15 (S.D. Fla. 1984).

74. *See* J.V. Peters & Co. v. Administrator, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,646 (6th Cir. 1985); Lone Pine Steering Comm. v. EPA, 600 F. Supp. 1487 (D.N.J.), *aff'd*, 777 F.2d 882 (3d Cir. 1985). In *Lone Pine* plaintiffs alleged that the EPA violated CERCLA because it proceeded with its own cleanup plan even though a committee of responsible parties was willing to clean the site properly. The court, however, found that the committee's letter purportedly offering to clean up the site was "a masterpiece of studied avoidance of commitment." *Id.* at 1496. The letter and the potentially lengthy process of getting all 140 responsible parties to share the financial responsibility were "suggestive of the bog into which courts would descend if CERCLA were interpreted to permit potentially responsible parties to obtain judicial review." *Id.* *See also* United States v. Outboard Marine Corp., 104 F.R.D. 405, 22 Env't Rep. Cas. (BNA) 1124 (N.D. Ill. 1984).

75. *See Lone Pine*, 600 F. Supp. at 1498-99 ("I see no reason why plaintiffs cannot raise as a defense in a cost recovery action every objection to the ROD which could legitimately raise in a judicial proceeding at this time."); *J.V. Peters*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,647-48 ("They can suffer no deprivation until the adjudication of the section 107 litigation, however, and they will have full opportunity to argue liability at that time.").

76. 584 F. Supp. 1005 (N.D. Ohio 1984).

77. *Id.* at 1010. The court stated that "if the owner or operator of a waste facility averred that the EPA had absolutely no rational basis for undertaking a response action

amendment to find that Congress did not intend pre-enforcement judicial review of EPA action.[78] The proposed amendment expressly allows judicial review only when the government seeks cost recovery.[79] The Senate committee noted that this amendment recognizes that "pre-enforcement review would be a significant obstacle to the implementation of response actions. . . . Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups."[80]

In *Industrial Park Development Co. v. EPA*[81] the EPA On-Site Coordinator (OSC)[82] unilaterally determined that the Industrial Park Development Company was not properly completing a private removal plan. The OSC decided the EPA would enter and clean up the site.[83] Noting the significant delegation of authority to the OSC, the district court questioned the constitutionality of CERCLA. The court stated that it had "grave doubts about the constitutionality of delegating to a variety of administration officials statutory authorization for deprivation of property without prior notice and hearing or prompt subsequent administrative or judicial review."[84]

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and that no preliminary assessment had been made, a federal court would entertain the claim." *Id.*

78. 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,646 (6th Cir. 1985).

79. *See supra* note 34.

80. S. REP. No. 11, 99th Cong., 1st Sess. 58 (1985).

81. 604 F. Supp. 1136 (E.D. Pa. 1985).

82. 40 C.F.R. § 300.6 (1986) defines the OSC as an official designated to coordinate and direct federal responses under the national contingency plan.

83. 604 F. Supp. at 1142.

84. *Id.* at 1141. In addition, the court distinguished Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), in which the Supreme Court upheld the Surface Mining Control and Reclamation Act. Under that statute, a prompt post-deprivation hearing was an integral part of the emergency power and the authority to halt mining operations was not further delegated to such a low level federal official. *Id.* at 303.

In *Industrial Park* the EPA issued an order pursuant to § 106(a) directing Industrial Park Development Company (IPDC) to submit and implement a plan to clean up a site. 604 F. Supp. at 1138. IPDC did not bind itself to the terms of the order, but it did hire an independent consultant to prepare and execute a plan for the removal of waste from the site. *Id.* at 1139. The OSC orally agreed to phase I of the plan, but objected to phase II because of the timetable. *Id.* at 1140. After objecting to the revised plan on essentially the same grounds, the OSC advised IPDC that the EPA would undertake its own cleanup action. *Id.* After several more brief extensions, the EPA rejected a newly revised plan essentially because IPDC "failed to move up all activities by four days; they extended an agreed on two day tanker cleanup activity to three days, . . . they did not include the agreed to additional PCB testing; and they deleted the bulk solids testing

In a factually analogous case, *Outboard Marine Corp. v. Thomas*,[85] the EPA acted pursuant to an ex parte warrant to take a sizable tract of property that was not claimed to be contaminated. The Sixth Circuit held that unless an emergency exists, the EPA has no authority under CERCLA to enter private property that is not part of the hazard.[86] Although the court did not reach the due process issues addressed in *Industrial Park*, it did not reject plaintiff's assertion that constitutional restraints and the principles of eminent domain restrain the EPA's cleanup activities.[87] Even if Congress amended CERCLA to permit this type of EPA action in non-emergency situations, the constitutional due process issue raised in *Industrial Park* might prevent this deprivation without a prompt post-deprivation hearing.

VI. JUDICIAL REVIEW FOR THE PUBLIC

Congress intended the EPA to encourage public participation throughout the entire hazardous waste site evaluation and cleanup process.[88] The right of a citizen group to seek judicial review of an EPA administrative cleanup order or EPA cleanup plan has yet to be litigated. To a certain extent, the private right of action for citizen groups under CERCLA diminishes their need and authority to challenge EPA cleanup decisions.[89] A community or public interest group that can

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from the analysis schedule." *Id.* Over IPDC's objections, the OSC conducted an EPA cleanup at the site. *Id.* Despite the likelihood of success on the merits, the court denied IPDC's motion for a preliminary injunction because there was no showing of irreparable injury. *Id.* at 1145. The site was vacant and there were no pending plans for its lease or development. *Id.* at 1144.

85. 773 F.2d 883 (7th Cir. 1985). After years of litigation, the EPA abandoned the attempt to have plaintiffs clean up the site and initiated its own response. *Id.* at 885. Through an ex parte warrant, the EPA attempted to gain access to the property for a phase 1 action, including a "walk-through" visit of 16 persons and 7 vehicles, a survey, and 23 subsurface borings that would require 17 people and 16 vehicles. *Id.* The operation would require about 1000 square feet of the plaintiff's parking lots and the eventual full scale operation would occupy six acres. *Id.*

86. *Id.* at 890. The EPA did not contend that this was an emergency situation. Rather, the court stated that "[t]here is no imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance. If there is an emergency, it is almost ten years old." *Id.* at 886.

87. *Id.* at 888.

88. *See* 42 U.S.C. § 9605(9) (1982); 40 C.F.R. §§ 300.24, 300.61(c)(3).

89. The courts have found an implied private right of action in 42 U.S.C. § 9607(a)(4)(B) (1982). For decisions establishing the private right of action, see Wells v. Waste Resource Corp., 22 Env't Rep. Cas. (BNA) 1785 (6th Cir. 1985); Levin Metals

initiate investigation or hazardous waste cleanup has less need to force EPA action.[90] In addition, the EPA policy of soliciting comment during public hearings on a particular waste site also lessens the need for formal judicial review.[91]

In *Lone Pine Steering Committee v. EPA*[92] plaintiffs argued that the lack of judicial review deprives the public of any opportunity to challenge EPA decisions. Plaintiffs alleged that without judicial review the public lacks a remedy even if the EPA response action is patently inadequate.[93] Specifically, plaintiffs claimed that the public does not have the opportunity for review in a post hoc proceeding. The district court explained that the statute may contemplate a different rule of judicial review with respect to victims of a hazardous waste site.[94] Although the statute was designed particularly to protect these victims, it contains no specific provision for obtaining judicial review.[95] The court recognized that an analysis of the statute "might lead to the conclusion that Congress intended that the victims have the right to a judicial

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Corp. v. Parr-Richmond Terminal Co., 608 F. Supp. 1272 (N.D. Cal. 1985); Bulk Distrib. Centers Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135 (E.D. Pa. 1982). Proposed legislation would expressly codify this private right of action. *See* S. REP. NO. 11, 99th Cong., 1st Sess. 61-62, 119-20 (1985).

The pressure for judicial review of prosecutorial decisions is relieved by the existence of alternative remedies that enforce the law if the EPA fails to act. *See* Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney, 52* U. CHI. L. REV. 653, 671-72 (1985). It can also be very difficult to challenge an agency without alleging more than general arbitrariness. *Id.* at 682. *But cf.* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) (plaintiffs used EPA findings of dangerousness of DDT as basis for review of EPA inaction).

90. The EPA, however, opposes language in proposed House and Senate bills that would grant individual citizens the right to sue government agencies and private companies to compel cleanup. In the EPA's opinion such a provision would disrupt its efforts to manage the cleanup process and force the agency to become involved in a large number of lawsuits, thus diverting resources away from more important activities. *Thomas Cautions Congress Not to Make Significant Changes in Superfund Statute*, 16 Env't Rep. (BNA) 1232 (1985).

91. *See* Lone Pine Steering Comm. v. EPA, 600 F. Supp. 1487, 1492 (D.N.J. 1985). Proposed legislation would add a new subsection to § 104 that would require an opportunity for public comment before the federal government or any state selects a particular remedial action, enters into any settlement agreement, or otherwise disposes of any claim against any party. *See* S. REP. NO. 11, 99th Cong., 1st Sess. 37-38, 97 (1985).

92. 600 F. Supp. 1487 (D.N.J.), *aff'd*, 77 F.2d 882 (3d Cir. 1985).

93. *Id.* at 1499.

94. *Id.*

95. *Id.*

review of [an EPA record of decision]."[96]

Despite this encouraging language, the public may not possess any special rights to challenge EPA cleanup actions. In discussing a proposed citizen suit provision for CERCLA, the Senate noted that the provision's language clearly indicates "that a citizen suit cannot be used to seek pre-enforcement judicial review of any remedial action or enforcement order. This is consistent with the clarification made elsewhere in the bill, eliminating pre-enforcement review of administrative orders."[97]

VII. CONCLUSION

In pending legislation, the Senate expressly denies pre-enforcement judicial review of EPA decisions.[98] Despite the Senate's assertion that CERCLA affords adequate protection of the due process rights of potentially responsible parties, the Senate bill does not directly address this constitutional issue.[99] In effect, Congress has left the courts with the difficult task of balancing due process rights of potentially responsible parties against the statutory purpose of achieving effective cleanup of hazardous waste. CERCLA, unlike all other significant environmental legislation, does not guarantee a prompt post-deprivation hearing or judicial review.[100] Few people will argue that the EPA has a significant need to act in emergency situations without the delay caused by judicial review. If the EPA, however, allows potential emergency situations to endure for years without taking some kind of action,[101] the EPA's desire to act free of judicial review may yield to the due

96. *Id.*

97. S. REP. NO. 11, 99th Cong., 1st Sess. 62 (1985).

98. *See supra* note 34 for text of the proposed amendment.

99. S. REP. NO. 11, 99th Cong., 1st Sess. 58-59 (1985).

100. *See supra* note 35.

101. *See, e.g.,* Outboard Marine Corp. v. Thomas, 773 F.2d 883 (7th Cir. 1985); Freedman, *supra* note 14, at 61. Freedman states that if considerable time is necessary for an administrative agency to take summary action after the agency is aware of an unlawful condition, "Congress should consider whether the preliminary injunction procedure is not the more appropriate method of regulation, since it is difficult to maintain that an 'emergency' justifying summary action exists in such circumstances." *Id. But cf. Lone Pine*, 600 F. Supp. at 1498 ("It should be obvious that every day's delay in dealing with a hazardous site entails risks. Just because unavoidable delays are required to plan and implement a response does not mean that Congress contemplated the additional delays which judicial review would entail.").

process rights of potentially responsible parties.[102]

One possible solution is for Congress and the courts to recognize the significant differences between a section 106(a) administrative order and a section 104 EPA cleanup and reimbursement action. Under a section 106(a) EPA administrative cleanup order no guarantee exists that the EPA's action will be subject to a prompt post-cleanup hearing or judicial review.[103] In fact, a party that complies with the order severely limits its rights against previous EPA informal action. The complying party's only remedy is to sue other responsible parties.[104]

On the other hand, if the party refuses to comply with an order, there is no guarantee of a quick review by the courts. The EPA may wait months or years before either seeking judicial enforcement or cleaning up the site itself. During that time, CERCLA penalties may accrue and the physical evidence may deteriorate.[105] Congress, therefore, should mandate that the EPA provide an administrative hearing after issuing a section 106(a) order.

In contrast, the justifications for denying immediate judicial or administrative review of a section 104 EPA cleanup action are much stronger. When directed to abate a hazardous threat, the responsible party feels the financial impact of a section 106(a) administrative order immediately. When the EPA acts under section 104, however, no actual property deprivation occurs until after a suit for reimbursement.[106] The EPA, therefore, can justify deferring judicial review until that time.[107]

Under this proposal, if an emergency situation exists, the EPA could clean up the site under section 104 without delaying judicial or administrative hearings. EPA section 104 cleanup action would thereby satisfy the congressional desire for fast, unimpeded action. In those cases that do not require immediate action, the EPA could act under section 106(a) to grant responsible parties access to an administrative hearing. Despite Superfund's financial limitations,[108] Congress and the courts

102. *See supra* notes 43-71, 81-87 and accompanying texts.

103. *See supra* note 43-44 and the accompanying text.

104. *See supra* notes 45-46 and the accompanying text.

105. *See supra* notes 43-44 and the accompanying text.

106. *But see supra* notes 85-87 and accompanying text.

107. Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 887 (3d Cir. 1985).

108. *See supra* note 72.

should carefully reconsider provisions such as section 106(a) that allow the EPA to act without the threat of judicial review.

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